No. 84-995 (3)

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

**JAMES MASSA,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

## REPLY BRIEF FOR PETITIONER IN SUPPORT

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## TABLE OF CONTENTS


PAGE

Argument In Reply ..... 1


## TABLE OF AUTHORITIES

*Cases*


Canfield v. Rapp & Son, Inc., 654 F.2d 459 (7th Cir. 1981) ..... 6

Chapman v. California, 386 U.S. 18 (1967) ..... 2

Hagner v. United States, 285 U.S. 427 (1932) ..... 5

Hamling v. United States, 418 U.S. 87 (1974) ..... 5

Kotteakos v. United States, 328 U.S. 750 (1946) ..... 3

McGrath v. Zenith Radio Corp., 651 F.2d 458 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981) ..... 5, 6

United States v. Agurs, 427 U.S. 97 (1976) ..... 3

United States v. Bright, 517 F.2d 584 (2d Cir. 1975) ..... 3

United States v. Hasting, 461 U.S. 499 (1983) ..... 2

United States v. Knippenberg, 502 F.2d 1056 (7th Cir. 1974) ..... 5

United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) 5

United States v. Previte, 648 F.2d 73 (1st Cir. 1981) ..... 5

United States v. Richardson, 687 F.2d 952 (7th Cir. 1982) ..... 5


*Statutes*


Fed. R. Crim. Pro. 12 ..... 5

Fed. R. Crim. Pro. 52 ..... 5

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## REPLY BRIEF FOR PETITIONER IN SUPPORT

Petitioner respectfully submits this brief in reply to respondent's brief in opposition.

1. Petitioner disputes the characterization of the record set forth in respondent's brief (Opp. 1-9) and refers this Court to his Statement of the Case (Pet. 2-11).

2. Respondent acknowledges that a reviewing court must make its determination of whether error is harmless based upon the effect that the error may have had on the jury, and not based upon its view of the defendant's guilt

or innocence (Opp. 14). Respondent concedes that "the court of appeals did not expressly state that it had assessed the record from the perspective of a jury" (Opp. 14). Respondent's attempt to characterize this error as "a matter of form, not substance" is not successful (Opp. 14).

The court of appeals did no more than assess the cold record to determine whether it contained sufficient evidence, absent the testimony admitted in violation of the Confrontation Clause, to sustain the finding of guilt (Pet. 19a-20a). Nowhere does the court below weigh any of the factors that may have influenced the jury in reaching its verdict. For example, the court simply ignored the fact that the objectionable out-of-court statements purportedly came from Brimberry, who never testified yet was the acknowledged mastermind and the only person who would know whether petitioner knowingly participated in the scheme. Similarly, the court ignored the fact that Brimberry's uncross-examined statements provided the only arguably direct evidence in the case.* Most important, the court of appeals ignored the trial court's assessment of the Government's case at trial. The district judge, who viewed the Government's witnesses and heard their live testimony with the jury, stated that the evidence of guilt—even *with* the improper evidence—was not very strong (11 Tr. 28).

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* Petitioner does *not* argue, as respondent suggests, for a per se rule that the admission of improper evidence requires reversal of all convictions based solely on circumstantial evidence (Opp. 12 n.18). However, this Court's harmless error opinions, from *Chapman* v. *California*, 386 U.S. 18, 25-26 (1967) through *United States* v. *Hasting*, 461 U.S. 499, 511 (1983), all note the presence of strong direct evidence when they affirm convictions (*See* Pet. 15-16). While circumstantial evidence could be of sufficient strength to justify a conclusion of harmless error, it is not in this case, as the trial court noted (11 Tr. 28).

The appellate court's belief that the improper evidence was "hardly damaging enough to require reversal" (Pet. 19a) therefore is *not* the same in substance as a conclusion that that evidence did not influence the jury in reaching its verdict. As this Court held in *United States* v. *Agurs*, 427 U.S. 97, 112 (1976), "when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but very slight effect.' *Kotteakos* v. *United States*, 328 U.S. 750, 764." This Court should issue a Writ of Certiorari because the opinion below is in direct conflict with the stringent harmless error standard set forth in *Kotteakos*, *Agurs*, and the other harmless error decisions of this Court.*

3. Respondent all but concedes that the appellate court's approval of the use of the unbalanced "willful blindness" instruction conflicts directly with the Second Circuit's decision in *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975). Indeed, the only argument that respondent can muster on the merits is that the willful blindness instruction used below is acceptable when viewed in the "charge as a whole" (Opp. 14-15). However, this argument does not avoid the conflict between these circuits because the *Bright* court addressed this very question and reversed despite the use of another instruction that correctly set forth the "knowledge" requirement of the relevant offense, possession of stolen mail. It was "the lack of juxtaposition of the choices available in a balanced way [that] was fatally

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* Petitioner is mindful of the limit on the time this Court can devote to the review of an evidentiary record. This limit, however, does not mitigate against issuing the writ here, because the question presented addresses the standard used below. After plenary review, if this Court concludes that the court of appeals applied an incorrect standard, it can remand the case to the court of appeals for reconsideration under the correct standard.

erroneous. . . .'' 517 F.2d at 588. The need for a juxtaposed balance was particularly acute below, where the crimes alleged were far more complex and the ''charge as a whole'' included more than 70 separate instructions.

Respondent seeks to avoid review on the merits by persuading this Court that the issue presented is one of plain error because petitioner failed to object properly at the trial (Opp. 12-13). This is not so. Petitioner objected to the willful blindness instruction before the trial court charged the jury, and thus gave the court an opportunity to correct its error (12 Tr. 161). Furthermore, petitioner tendered his Requested Instruction A, which would have obviated the need for the balancing language if the district court had accepted it in lieu of the willful blindness instruction.* However, the trial court rejected Instruction A at the same time it overruled petitioner's objections to the willful blindness instruction (12 Tr. 161). Finally, the court of appeals addressed the propriety of the willful blindness instruction below even though respondent had made the same argument to avoid the merits (Pet. 23a-26a). The conflict between the court of appeals below and the Second Circuit is therefore squarely presented, and this Court should issue a Writ of Certiorari to address this issue.

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* Requested Instruction A read:

Actual knowledge that defendant Massa knew fictitious security positions were created in his Stix customer accounts is an essential element of the offenses charged in Counts Two through Thirteen, 23 through 28 and 30 through 40. You may not find defendant Massa guilty unless you find beyond reasonable doubt that he knew fictitious security positions were created in his Stix customer accounts.

The fact of knowledge, however, may be established by direct or circumstantial evidence just as any other fact in the case.

4. Respondent's effort to avoid the issue whether the "sale-of-business" doctrine applies to criminal prosecutions under the securities laws is without substance. Respondent does not dispute that "the right to be free of prosecution under an indictment that fails to charge an offense is a substantial right" and that conviction under such an indictment is plain error. *United States* v. *Meacham*, 626 F.2d 503, 509 (5th Cir. 1980). See Federal Rules of Criminal Procedure 12(b)(2) and 52(b). Respondent's cases are all inapposite; they address either technical defects in indictments* or the issue whether the indictment provided adequate notice of the offense charged.** None of respondent's cases address the situation presented here, where the very language of the indictment demonstrates that the alleged acts fall outside the scope of the statutory offense.

Respondent implicitly concedes that the sale-of-business issue is worthy of this Court's review by addressing the merits of the issue rather than contesting its significance. Citing only to a footnote in one appellate court opinion, *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 467-68 n.5 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981), respondent contends that the sale-of-business doctrine should not apply here because petitioner allegedly acquired control of Stix as a result of 5 purchases from 3 people (Opp. 16-18).

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* *United States* v. *Knippenberg*, 502 F.2d 1056 (7th Cir. 1974) (omission of the word "willfully"); *Hagner* v. *United States*, 285 U.S. 427 (1932) (omission from one paragraph of the phrase "to be sent or delivered by the post office establishment" where the indictment made that allegation sufficiently in another paragraph).

** *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *Richardson*, 687 F.2d 952 (7th Cir. 1982); *United States* v. *Previte*, 648 F.2d 73 (1st Cir. 1981).

Under the "economic realities" test, however, *McGrath* is inapposite because it involved many people selling small numbers of shares. In contrast, petitioner acquired his controlling interest by purchasing more than 50% of Stix's stock from its treasury, upon votes of the directors, and the rest of his interest from two Stix directors and the head of a Stix subsidiary (4 Tr. 12-16, 105-07, 175-82). Courts have applied the sale-of-business doctrine in similar multiple-seller cases. *E.g., Canfield* v. *Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981). That petitioner acquired control through more than one purchase is likewise irrelevant under the economic realities test. The indictment itself specifically alleges that petitioner intended to and did acquire and exercise control of Stix.* Indictment, Counts 30-34 incorporating Count I ¶¶ 8.F. 28-33. Therefore, if the sale-of-business doctrine is valid law, the indictment cannot stand.

At the very least, respondent's brief establishes that this issue is both novel and important. This Court should issue a Writ of Certiorari to address the applicability and scope of the sale-of-business doctrine in a criminal case.

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Dated: March 22, 1985

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* The references to trial testimony in respondent's concluding paragraph and footnote (Opp. 16-18 & n. 27) are irrelevant to the issue at hand: whether, under the sale-of-business doctrine, the indictment charges violations of the securities laws.